management except at the direction of a central committee; (iv) subsidiaries were established for the convenience of the parent company, primarily for tax reasons; (v) all of the subsidiaries were dependent upon the parent company for funding and capital; (vi) the financial management of the entire enterprise was conducted in an integrated manner; and (vii) no subsidiary exercised control over its own finances. *See* Pet. App. 34a-35a.

Indeed, the *sole purpose* of creating two of these subsidiaries was to create a basis for reducing the Owens Corning enterprise's state and local taxes. *See* CA App. 1057-60. Notably, OCD's tax department identified "glaring holes" in the attempts to create an "appearance of substance" for one subsidiary, and proposals for closing these "glaring holes" were rejected by OCD's tax department. *Id.* at 1160-62. Further, millions of dollars in payments from OCD to subsidiary IPM were unilaterally and retroactively recharacterized on IPM's books by OCD's tax department in order to secure additional tax benefits. *Id.* at 1191, 1197-1204.

IPM's lack of any real substance is further evidenced by two internal OCD memoranda introduced at trial that demonstrated a scheme to create the "appearance" that IPM was "in the loop" on business transactions by giving "the *impression* that IPM's subsidiaries are advising their parent company of upcoming transactions and copying IPM's parent in order to keep it informed." *Id.* at 5389 (emphasis added). Tellingly, both these "smoking gun" memoranda concluded with the admonition to their recipients to "destroy this memo or at the very least do not keep in your IPM file." *Id.* at 5388, 5389.

Third, while Credit Suisse now argues that the Banks bargained for, and obtained, the subsidiary guarantees to achieve structural seniority over OCD's other creditors, this assertion is belied not only by the terms of the 1997 Credit Agreement, but also by the Banks' statements in various offering materials. For instance, there is a complete lack of any reference to structural seniority in the loan offering materials that Credit Suisse, as agent, used to market the debt to the other original

members of the bank syndicate. *See id.* at 2512-92, 5943-6291. Even worse, many of the Banks served as underwriters on the Notes sold to the Bondholders. These banks, along with OCD, affirmatively misrepresented in the various prospectuses used when marketing the Notes to the Bondholders that the bond debt would rank equally and ratably to the bank debt. *See id.* at 2657, 2678, 2712.

These facts, which underlie the district court's findings, establish beyond any doubt that (i) there was "substantial identity" among the entities comprising the Owens Corning enterprise, which operated as a single economic unit controlled exclusively by the parent company OCD; (ii) in obtaining the Guarantees, the Banks did not (and could not) rely on the separate creditworthiness of any of the Subsidiary Guarantors; and (iii) the affairs of the Owens Corning enterprise were so entangled that substantive consolidation would achieve great benefits. This overwhelming evidence of interdependency would inevitably result in the granting of substantive consolidation under both the *Auto-Train* and *Augie/Restivo* standards.[4]

III. THE THIRD CIRCUIT'S DECISION IS HIGHLY SIGNIFICANT AND ADDS TO THE PREVAILING UNCERTAINTY ON THIS IMPORTANT ISSUE OF BANKRUPTCY LAW

Credit Suisse cannot credibly deny the importance of this case and this issue. Much has been written about the Third Circuit's decision, and it continues to be closely watched. *See, e.g.*, Kit Weitnauer, *Third Circuit Restricts Substantive Consolidation in Owens Corning*, 24 Am. Bankr. Inst. J. 26, 70-71 (Oct. 2005) ("Obviously, *In re Owens Corning* is an important case on substantive consolidation. . . . As a result, . . . equity's principal weapon – an inquiry into the substance

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[4] Credit Suisse's assertion that the Plan Proponents sought deemed consolidation only against the Banks is wrong; it would have affected distributions to all creditors. *See* CA App. 9893.3 (Plan § 6.1(b)).

of corporate separateness – has been utterly defeated by form."); Peg Brickley, *Owens Corning – A Substantive Consolidation Doubletake?*, Daily Bankr. Rev. (Dow Jones & Co., Inc.), Sept. 9, 2005, at 5; Bruce H. White & William L. Medford, *Substantive Consolidation Redux: Owens Corning*, 24 Am. Bankr. Inst. J. 30 (Nov. 2005). As these commentators consistently recognize, the Third Circuit's decision is a highly significant one that breaks with past law and thus, in the words of Credit Suisse's own counsel, "*will have a significant impact on chapter 11 cases . . . [e]ven beyond the Third Circuit.*" Berkovich, *supra*, at 16.

Nor can Credit Suisse dispute that substantive consolidation is a central issue in modern corporate bankruptcy cases. It has been used in 8 of the 10 largest corporate bankruptcies, including, contrary to Credit Suisse's statement, the Enron case. *See* Williams H. Widen, *Prevalence of Substantive Consolidation in Large Bankruptcies from 2000 to 2004: Preliminary Results* 12 (Jan. 20, 2006). The proper use and scope of substantive consolidation is thus a core bankruptcy issue as to which the courts disagree and that warrants this Court's attention.

Beyond that, a consistent standard from this Court is necessary for lenders to know whether creditor recoveries will come from a single borrower, or the borrower and its affiliates, as well as what other creditors could be seeking recovery from their borrower. But, "[u]nfortunately," under current law, "it is virtually impossible to predict when related entities will be consolidated. The substantive consolidation decisions expose numerous standards that are susceptible to broad variations in application." Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. Pitt. L. Rev. 381, 384 (1998). These factors compel a grant of certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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April 11, 2006